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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2054

HUDSON BERLIND CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. 15–21) is reported at 494 F. 2d 1200. The decision and order of the National Labor Relations Board (Pet. 23–45; A. 2–27)[1] are reported at 203 NLRB No. 63.

JURISDICTION

The judgment of the court of appeals (Pet. 21–22) was entered on April 25, 1974. The petition for a writ of certiorari was filed on July 20, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "A." refers to the printed appendix in the court below.

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that the employer recognized, and entered into a collective bargaining agreement containing a union security clause with, a union at a time when a real question existed concerning whether the employees desired that union or another union as their representative.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. 2–4.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

H. Berlind, Inc. (Berlind) of Floral Park, New York, and Hudson Housewares Corporation (Hudson) of Brooklyn, New York, were both engaged in the wholesale distribution and sale of household goods and related products. At the time relevant to this proceeding, Berlind employed 10 warehouse workers who were represented by Local 810, Steel, Metals, Alloys and Hardware Fabricators and Warehousemen, affiliated with the International Brotherhood of Teamsters, which had a collective bargaining agreement expiring April 18, 1972; Hudson's 31 warehouse employees were represented by Local 222 of the International Production Service and Sales Employees Union, which had a contract expiring March 15, 1972. (A. 3, 4, 15; 29–33, 40, 58–59, 79–80.)

Berlind and Hudson were purchased by Greenman Brothers, Inc. (Greenman) in September and Decem-

ber, respectively, of 1971 (A. 3, 4, 15; 30–31, 40). Greenman intended, as it informed the officers of Berlind and Hudson, to close both operations and to move them to Greenman's new facility in Hicksville, New York, some 40 miles away from Brooklyn. It further intended to merge both corporations under the name of Hudson Berlind Corporation (Hudson Berlind, or the Company), thus creating a wholly new unit for collective bargaining by the warehouse employees. (A. 4, 15, 17–18; 57–58, 80–81, 88–90, 93.)

In January 1972, Greenman changed the corporate name of Hudson to Hudson Berlind, and began negotiations with Local 222 for a new contract to replace the one due to expire in March (A. 4, 15; 54, 74–76, 81). On January 31, more than five weeks before the opening of the new Hicksville facility and the resulting formation of the new unit, Local 222 and Hudson Berlind signed a three-year contract, which included a provision establishing Local 222 as the exclusive representative of all warehouse employees at any present or future establishment of Hudson Berlind (A. 4, 15, 20; 33, 40–49, 60, 74).[2] On February 28, the Brooklyn facility was closed, and on March 10 Hicksville opened for business. Ten of the warehouse employees who had been at Brooklyn when the contract was executed left the employ of Hudson Berlind by the time Hicksville opened and were replaced by new workers. There was no fresh showing of majority

[2] The contract also contained a union security provision requiring membership in Local 222 within 30 days of hiring (A. 20; 33, 40–42).

status on the part of Local 222 on January 31, March 10, or at any time thereafter. (A. 4, 15–16; 33, 40, 58, 59, 81–85.)

In the meantime, Local 810 was unaware not only of Greenman's plan to move Berlind to Hicksville and merge it with Hudson, but also of the fact that Greenman had taken ownership of Berlind. Local 810 was not told of the September 1971 purchase until mid-February, when it sought to renegotiate its contract. (A. 5, 16; 61, 89, 91.) Subsequently, on February 24, Greenman's attorneys informed Local 810 that the move and merger would take place as of June 1, and that, since Hudson had more employees than Berlind, Greenman had decided to recognize Local 222 and had already signed a contract covering the new unit at Hicksville. Greenman declined to discuss possible representation for Local 810. (A. 5, 16; 62–65.)

On March 15, Local 810 filed unfair labor practice charges against Hudson Berlind, and three weeks later, after soliciting authorization cards from the former Hudson employees who had moved to Hicksville, it filed a representation petition (A. 1, 5–6, 16, 18–19; 28, 31, 64). In addition, all 10 Berlind warehouse employees accepted jobs at Hicksville; in early June, the Floral Park operation was closed and the 10 Berlind warehousemen began working at Hicksville (A. 5, 16; 55–56, 58–59, 83).

B. THE BOARD'S CONCLUSIONS AND ORDER

The Board found that the Hicksville facility was not an extension or accretion to the Local 222 Brooklyn unit, but rather an entirely new facility

(Pet. 38–39). The Board further found that, by virtue of Local 810's representative status, Hudson Berlind was on notice that it was faced with conflicting claims of two unions currently representing the employees to be transfered. Thus, it violated Section 8(a)(2) of the Act by recognizing Local 222 as the representative of the warehouse employees at Hicksville, and thereby depriving those employees of their rights to have the representation question determined by a Board election. (Pet. 40–41.) The Board also found that Hudson Berlind violated Section 8(a)(1) and (2) of the Act by recognizing Local 222 as the exclusive representative of the warehouse employees at Hicksville at a time when there was no representative group of workers employed there (Pet. 40). Finally, the Board found that Hudson Berlind violated Section 8(a)(3) and (1) of the Act by applying Local 222's union security clause to the Hicksville employees (Pet. 41).

The Board ordered Hudson Berlind to cease and desist from the unfair labor practices found and from "in any like or related manner" interfering with its employees' Section 7 rights; to withdraw and withhold recognition from Local 222 as the representative of its employees at the Hicksville warehouse unless and until the Board certifies that labor organization as such representative; to reimburse all present and former employees at the Hicksville warehouse, except those who joined Local 222 prior to the execution of the contract and its union security provision on January 31, 1972, for all initiation fees, dues, and other moneys, if any, paid by or withheld from them pur-

suant to the terms of the contract; and to post appropriate notices (Pet. 43–45).

C. THE COURT OF APPEALS DECISION

The court of appeals sustained the Board's finding that Hicksville was a separate unit and that a real question concerning representation existed when Hudson Berlind recognized Local 222 as the representative for the Hicksville facility. Accordingly, it sustained the Board's conclusion that Hudson Berlind had violated Section 8(a)(2) of the Act, and, because the contract contained a union security clause, also Section 8(a)(3) and (1) (Pet. 19–20). The court therefore enforced the Board's order (Pet. 21).[3]

ARGUMENT

1. Petitioner does not contest the settled principle that, when two unions compete for the support of the employees in a given unit, the employer must maintain a neutral position because any action by an employer "which demonstrates in any way a preference for one union over the other * * * interfer[es] with the fundamental right of [the] employees to choose their own representative." *Southern Conference of Teamsters* v. *Red Ball Motor Freight, Inc.*, 374 F. 2d 932, 938 (C.A. 5). Accord: *National Labor Relations Board* v. *National Container Corp.*, 211 F. 2d 525, 536 (C.A. 2); *National Labor Relations Board* v. *Sellers*, 346 F. 2d 625, 631 (C.A. 9). Moreover, it finds "unobjectionable"

[3] The court found it unnecessary to consider the Board's alternative holding that the contract was an unlawful prehire agreement (Pet. 18).

(Pet. 7–8) the Board's application of that principle in its *Midwest Piping* doctrine, 63 NLRB 1060, which holds that, where a real question concerning representation exists, an employer "may not recognize or enter into a contract with [a union] * * * until its right to be recognized has finally been determined under the specific procedures provide by the Act." *Retail Clerks Union, Local 770* v. *National Labor Relations Board,* 370 F. 2d 205, 207 (C.A. 9).

Petitioner's basic contention is that a real question concerning representation did not exist at the time the Company executed its January 1972 contract with Local 222. Since the court of appeals held that the Board's finding that a real question existed was supported by substantial evidence, that issue does not warrant further review. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 488–491. In any event, there is ample support for the Board's finding.

Although the Company planned to offer employment at Hicksville to all the warehouse employees of both Hudson and Berlind—and the Hudson employees, represented by Local 222, outnumbered the Berlind employees by a 3–1 ratio—it had no way of knowing how many would accept, particularly in light of the fact that the Hicksville location was 40 miles away from the old Hudson facility in Brooklyn.[4] See *Cooper Thermometer Co.* v. *National Labor Relations Board,*

[4] The Board found (Pet. 18), and the Company no longer contests (Pet. 5, n. 3), that the Hicksville plant was an "entirely new facility," and not merely an accretion to the plant formerly occupied by Hudson.

376 F. 2d 684, 689 (C.A. 2). Indeed, by the time the move from Brooklyn to Hicksville was completed, 10 of Hudson's 31 warehouse employees had left and were replaced by 10 new employees for the new facility. Furthermore, the fact that the employees of the two units that were to be merged traditionally had been represented by different unions placed the Company on notice that Local 810 would, at the very least, be interested in continuing to represent its longstanding members. And, two months before the Berlind employees—all 10 of whom made the transfer—began work at Hicksville, Local 810 was able to solicit enough cards from the employees then at Hicksville to support the filing of a representation petition.[5]

On these facts, the Board was warranted in concluding that there was a real question as to which union, if any, represented a majority of the warehouse employees at the Hicksville plant, both before and after the plant became operational.

2. The three cases the Company asserts (Pet. 9–10) conflict with the decision below are distinguishable.

In *National Labor Relations Board* v. *Wheland Co.*, 271 F. 2d 122 (C.A. 6), the employer had operated

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[5] That petition is being held in abeyance pending the outcome of the instant proceeding. The Board will dismiss a representation petition unless it is supported by evidence that the petitioning union "has been designated by at least 30 percent of the employees." NLRB Statements of Procedure (Series 8, as amended), Sec. 101.18, 29 C.F.R. 101.18.

The prime reason for Local 810's failure to file a representation petition before the Company signed the contract with Local 222 was that it was not aware of the merger until several weeks after the contract was signed.

two plants, with a different union representing the employees of each. When the employer decided to merge the two plants at one of the existing locations, and so informed the two unions, the union representing the employees at the location that would continue operating demanded recognition but was refused. Subsequently, that union produced new authorization cards from 206 of the 213 workers then represented by it—a clear majority of the total future complement of 335. The employer then recognized that union. The court, finding that no real question concerning representation existed, held that the recognition was not unlawful.

In *American Bread Co.* v. *National Labor Relations Board*, 411 F. 2d 147 (C.A. 6), the employer, in a preexisting unit, recognized and signed a contract with one union following submission of authorization cards from a majority of the employees and a verification of their authenticity by a clergyman. The court found that this was sufficient to dissipate the representation claim of a rival union which had authorization cards from only 8 of the 92 employees in the unit—a number far short of that required to trigger the Board's election procedure.[6]

In *National Labor Relations Board* v. *Peter Paul, Inc.*, 467 F. 2d 700 (C.A. 9), the employer continued to bargain with an incumbent union in an established unit despite the fact that a challenging union had filed an election petition with the Board alleging the sup-

[6] See n. 5, *supra*.

port of 30 percent of the employees. The court found, contrary to the Board, that there was no real question concerning representation, since only days after the petition was filed the incumbent presented fresh evidence of overwhelming majority support: new checkoff authorizations from 134 of the 141 employees in the unit.

In sum, in all three cases the employer-recognized unions made fresh showings of their majority status in units that either had existed for some time (*American Bread* and *Peter Paul*) or whose makeup was certain (*Wheland*).[7] In the instant case, on the other hand, Local 222 made no such showing, and the ultimate roster of employees at the new Hicksville unit was uncertain. Accordingly, the finding that no real question concerning representation existed in those cases is not inconsistent with a contrary finding here.[8]

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[7] In *Wheland* both plants were in the same city, and the fresh majority was made up entirely of employees whose jobsite would not change.

[8] The fact that the Company may have acted in good faith in recognizing Local 222 is no defense. See *International Ladies' Garment Workers' Union* v. *National Labor Relations Board*, 366 U.S. 731. Furthermore, the Company's contention (Pet. 13) that it was without practical means of resolving the question of representation short of unilateral recognition of Local 222 is without merit. Even where neither contending union has petitioned for an election, the employer may itself file a petition with the Board. See *National Labor Relations Board* v. *Hunter Outdoor Products, Inc.*, 440 F. 2d 876, 880 (C.A. 1); *National Labor Relations Board* v. *Powhatan Bakery Corp.*, 330 F. 2d 921, 928 (C.A. 6); *National Labor Relations Board* v. *Signal Oil & Gas Co.*, 303 F. 2d 785, 788, n. 3 (C.A. 5).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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